

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MDL DOCKET No. 07-md-1861

In re: WELLNX MARKETING AND SALES
PRACTICES LITIGATION

MEMORANDUM AND ORDER ON DEFENDANTS
DEREK WOODGATE, BRAD WOODGATE, and GLOBAL HEALTH
TECHNOLOGIES, INC.'S MOTION TO DISMISS

May 29, 2009

STEARNS, D.J.

These consolidated civil actions relate to the manufacturing, marketing, and sale of allegedly spurious diet supplements.¹ Plaintiffs claim that defendants willfully and knowingly made false and misleading statements in advertising two products: “Slimquick – the Female Fat Burner” (Slimquick) and “NV–Rapid Weight–Loss Beauty Pill” (NV). Among the defendants are Derek Woodgate and Brad Woodgate (the “inventors” of the Slimquick and NV supplements), the companies that manufacture the supplements, and the supplements’ retail distributors.²

The class claims run the gamut from consumer fraud to conspiracy. The

¹On August 31, 2007, nine cases were transferred to this district for consolidated pretrial proceedings by the Multidistrict Litigation (MDL) Panel. Seven additional related cases are so-called “tag along” actions. The sixteen combined actions are collectively referred to as the “WellNx cases.”

²In addition to the Woodgates, the named defendants include Global Health Technologies, Inc. (Global Health), NxCare, Inc., NxLabs, Inc., WellNx Life Sciences, Inc. (WellNx), Scott Welch, Fortius Canada, Inc., Garden State Nutritionals, Robinson Pharma, Inc., and Swiss Caps USA, Inc. NxCare, Inc. and NxLabs, Inc., are alter egos of WellNx.

Massachusetts Amended Complaint is representative.³ It asserts: Count I - violations of Mass. Gen. Laws ch. 93A (consumer fraud) (all defendants); Count II - fraud (all defendants); Count III - civil conspiracy (individual defendants); Count IV - breach of express warranties (WellNx defendants); Count V - breach of implied warranty of merchantability (WellNx defendants); Count VI - breach of implied warranty of fitness for a particular purpose (WellNx defendants); Count VII - aiding and abetting (manufacturing defendants); Count VIII - civil conspiracy (all defendants); Count IX - negligence (all defendants); and Count XII - injunctive relief (all defendants).⁴

BACKGROUND

Derek Woodgate and Brad Woodgate are citizens and residents of Canada. The

³The allegations of the various Amended Complaints are not uniform. While each Amended Complaint contains roughly the same factual and class allegations, and mostly identical causes of action, the claims are not consistently asserted against the various defendants. Consequently, I have used the Massachusetts Amended Complaint as a template for the analysis and discussion.

⁴In the Nevada and New Jersey actions, plaintiffs have alleged the following causes of action related to the individual defendants' tortious conduct: Second Cause of Action (Nevada Deceptive Trade Practices Act/New Jersey Consumer Fraud Act); Third Cause of Action (fraud); Fourth Cause of Action (civil conspiracy); Fifth Cause of Action (manufacturing defect); Sixth Cause of Action (design defect); Seventh Cause of Action (corporate veil); Eleventh Cause of Action (civil conspiracy); Twelfth Cause of Action (negligence); Thirteenth Cause of Action (punitive damages); and Fourteenth Cause of Action (injunctive relief). In the Maryland action, plaintiffs have alleged the following causes of action related to the individual defendants' tortious conduct: First Cause of Action (violations of the Maryland Consumer Protection Act); Second Cause of Action (fraud); Third Cause of Action (civil conspiracy); Eighth Cause of Action (civil conspiracy); Ninth Cause of Action (negligence); Tenth Cause of Action (manufacturing defect); Eleventh Cause of Action (design defect); and Twelfth Cause of Action (injunctive relief). The Amended Complaints uniformly assert a claim under the consumer protection laws of each plaintiff's resident state, including claims for punitive damages where state law permits their recovery.

Woodgates are the co-Chief Executive Officers of WellNx. Brad Woodgate is the sole director of Global Health and Derek Woodgate is the sole director of WellNx. Global Health is a Canadian holding company that has no offices or employees. Global Health owns 100 percent of the shares of WellNx, a Canadian corporation organized under the laws of Ontario. It has its only office in Ontario. WellNx develops dietary supplements for sports nutrition, weight loss, and “general wellness.” Plaintiffs’ claims are, for the most part, premised on alleged fraud in the marketing and manufacture of Slimquick and NV.⁵

Plaintiffs allege that the Woodgates “directed” WellNx to disseminate misleading “testimonials” touting the virtues of Slimquick. According to the Amended Complaint, Derek Woodgate created the testimonials, copies of which were inserted in each box of Slimquick.⁶ According to the affidavit of Scott Welch, a former WellNx officer and co-defendant, the Woodgates knew that the testimonials had been cut from whole cloth. For example, Nadine Wall, one of Slimquick’s purported “before-and-after” successes, never used Slimquick at all (in fact, her testimonial was created before Slimquick was

⁵The New Jersey Amended Complaint makes similar claims about Liquid Hoodia Extreme, another WellNx weight-loss product.

⁶While plaintiffs do not contend that Brad Woodgate participated in the creation of the testimonials, they assert that he knew they were false.

“invented”).⁷ A second Slimquick testimonial featuring Kerrie Lee Brown⁸ is alleged to have “misled the public as ‘[Brown] did not actually weigh in’ at her stated weight.”

Plaintiffs further allege that defendants misrepresented the ingredients of Slimquick and NV in the product labels. In support of this claim, plaintiffs offer (1) a sworn statement filed by Craig Stevenson in unrelated litigation stating that the Woodgates were aware that many of the ingredients used in WellNx’s products did not meet the company’s own specifications, and (2) a sworn statement from Dr. Larry Walker, the Director of the National Center for Natural Products Research, who tested samples of Slimquick, NV, and Liquid Hoodia Extreme. Walker found that the products “frequently did not contain green tea and/or Hoodia at all, or, if present, the amount of the ingredients was frequently less than claimed on the labeling of these products.”⁹

The Amended Complaints allege that the WellNx Defendants distributed boxes of Slimquick and NV containing the misleading information throughout the United States.¹⁰

⁷Wall was the girlfriend of WellNx’s Vice-President of Marketing and the sister of WellNx’s graphic designer. The ad “falsely portrays Ms. Wall as an independent person with a nutrition background who had tried everything to lose weight but failed. Though she was ‘skeptical,’ she tried Slimquick and achieved a miraculous result.” Amended Complaint ¶ 80.

⁸Like Wall, Brown had a familial relationship with the company; she is the wife of Craig Stevenson, WellNx’s former Director of Marketing.

⁹Specifically, Walker found that two-thirds of the Slimquick samples he tested did not contain green tea and none of the Liquid Hoodia Extreme samples that he tested contained hoodia gordonii. Although defendants contend that there is a dispute as to the admissibility of the Walker and Stevenson affidavits, they have not filed a motion to strike.

¹⁰There is no allegation that Derek Woodgate or Brad Woodgate had any involvement in the marketing of NV or Liquid Hoodia Extreme.

Plaintiffs contend that the Woodgates

(1) knew or should have known that the SLIMQUICK and NV products did not contain, either at all or in the represented quantities, the so-called active ingredients of green tea and/or hoodia gordonii, and that even had the products contained these ingredients in the represented quantities, the scientific literature did not support the claims of rapid weight loss made by the defendants through the names of the products, through the packaging and inserts, and/or through the advertising and marketing the products. (Mass. Am. Compl. ¶ 65; Md. Am. Compl. ¶ 64; Nev. Am. Compl. ¶ 64; N.J. Am. Compl. ¶ 69.);

(2) did not develop an adequate, or any, testing protocol for the raw materials and so called active ingredients of green tea and/or hoodia gordonii. (Mass. Am. Compl. ¶ 66; Md. Am. Compl. ¶ 65; Nev. Am. Compl. ¶ 65; N.J. Am. Compl. ¶ 70.);

(3) did not test the raw materials of the SLIMQUICK and NV products for the genuineness and authenticity of the so-called active ingredients of green tea and/or hoodia gordonii, or they tested negligently for such raw materials and active ingredients, or they ignored the test results altogether. (Mass. Am. Compl. ¶ 67; Md. Am. Compl. ¶ 66; Nev. Am. Compl. ¶ 66; N.J. Am. Compl. ¶ 71.);

(4) failed to exercise reasonable care in assuring the authenticity of the so-called active ingredient hoodia gordonii and in assuring the presence of the so-called active ingredients in the represented quantities of green tea and hoodia gordonii. (Mass. Am. Compl. ¶ 68; Md. Am. Compl. ¶ 67; Nev. Am. Compl. ¶ 67; N.J. Am. Compl. ¶ 72.);

(5) intentionally, recklessly, or negligently failed to develop methods, processes or procedures to ensure the genuineness and authenticity of the hoodia gordonii represented to be in all of the products marketed and sold to the putative class. (Mass. Am. Compl. ¶ 69; Md. Am. Compl. ¶ 68; Nev. Am. Compl. ¶ 68; N.J. Am. Compl. ¶ 73.); and

(6) made deceptive claims on the label and/or in the package inserts concerning the effectiveness of the SLIMQUICK and NV [and in New Jersey LIQUID HOODIA] products. (Mass. Am. Compl. ¶ 70; Md. Am. Compl. ¶ 69; Nev. Am. Compl. ¶ 69; N.J. Am. Compl. ¶ 74.).

Derek Woodgate, Brad Woodgate, and Global Health move to dismiss arguing that

this court lacks personal jurisdiction over them in all of the forum states (Maryland, Massachusetts, Nevada, and New Jersey).

DISCUSSION

“In its simplest formulation, *in personam* jurisdiction relates to the power of a court over a defendant. It is of two varieties, general and specific. General personal jurisdiction . . . is the power of a forum-based court . . . ‘which may be asserted in connection with suits not directly founded on [that defendant’s] forum-based conduct. . . .’” Pritzker v. Yari, 42 F.3d 53, 59-60 (1st Cir. 1994), quoting Donatelli v. Nat’l Hockey League, 893 F.2d 459, 462-463 (1st Cir. 1990). Put another way, “[g]eneral jurisdiction exists when the litigation is not directly founded on the defendant’s forum-based contacts, but the defendant has nevertheless engaged in continuous and systematic activity, unrelated to the suit, in the forum state’ . . . Specific personal jurisdiction, by contrast, is narrower in scope and may only be relied upon ‘where the cause of action arises directly out of, or relates to, the defendant’s forum-based contacts.’” Pritzker, 42 F.3d at 60. “The proper exercise of specific *in personam* jurisdiction hinges on satisfaction of two requirements: first, that the forum in which the federal district court sits has a long-arm statute that purports to grant jurisdiction over the defendant;¹¹ and second, that the exercise of jurisdiction pursuant to

¹¹Under the prototypical Massachusetts Long-Arm-Statute, “[a] court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person’s (a) transacting any business in this commonwealth; . . . [or] (c) causing tortious injury by an act or omission in this commonwealth.” Mass. Gen. Laws ch. 223A, §§ 3(a) and 3(c). Massachusetts courts construe section 3(a)’s “transacting business” test as extending jurisdiction to the outermost limit permitted by the Due Process Clause. See Cambridge Literary Props., Ltd. v. W. Goebel Porzellanfabrik G.m.b.H. & Co. Kg., 295 F.3d 59, 63 (1st Cir. 2002). Section 3(a) is not limited to commercial activity, but also encompasses purposeful acts that are

that statute comports with the strictures of the [Due Process Clause of the] Constitution.”¹²

Id. See also Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474-476 (1985). If challenged, the burden is on the plaintiff to show a prima facie case authorizing personal jurisdiction. U.S.S. Yachts, Inc. v. Ocean Yachts, Inc., 894 F.2d 9, 11 (1st Cir. 1990). Mere reliance on the allegations of the pleadings is not enough. Chlebda v. H.E. Fortna & Brother, Inc., 609 F.2d 1022, 1024 (1st Cir. 1979).¹³

In the Amended Complaints, plaintiffs state that the WellNxd defendants (collectively) made “statements or omissions of material fact [that] . . . were false, were known by the defendants to be false (or were made on an insufficient basis of information), were made with the intent to induce the members of the plaintiff class to rely upon them, and were justifiably relied upon by the members of the plaintiff class to their detriment.” Amended

private and personal in nature. Hannon v. Beard, 524 F.3d 275, 280 (1st Cir. 2008) (corrections officials’ acts in arranging the transfer of an inmate to the Massachusetts prisons for temporary custody).

¹²The due process test is in three parts. “First, the claim underlying the litigation must directly arise out of, or relate to, the defendant’s forum-state activities. Second, the defendant’s in-state contacts must represent a purposeful availment of the privilege of conducting activities in the forum state, thereby invoking the benefits and protections of that state’s laws and making the defendant’s involuntary presence before the state’s court foreseeable. Third, the exercise of jurisdiction must, in light of the Gestalt factors, be reasonable.” United Elec. Radio and Mach. Workers of Am. v. 163 Pleasant St. Corp., 960 F.2d 1080, 1089 (1st Cir. 1992).

¹³Here, because each of the four Long-Arm Statutes at issue permits the exercise of personal jurisdiction to the extent permitted by the Due Process Clause, the constitutional constraint is the sole relevant inquiry. See Moldflow Corp. v. Simcon. Inc., 296 F. Supp. 2d 34, 39 (D. Mass. 2003) (“[F]ederal courts in Massachusetts may ‘sidestep the statutory inquiry and proceed directly to the constitutional analysis.’”) (citation omitted). See also ALS Scan, Inc. v. Digital Servs. Consultants, Inc., 293 F.3d 707, 710 (4th Cir. 2002).

Complaint ¶ 98. Plaintiffs base the argument for personal jurisdiction over the Woodgates on their (putative) liability for fraud committed against consumers in the forum states.¹⁴ The Woodgates, for their part, argue that even if the allegations of the Amended Complaint are taken as true, that is, that they knowingly created and published fraudulent marketing materials to promote the sale of the supplements, nothing is alleged to connect these materials to any injury suffered by plaintiffs.

The Woodgates point out that there are no allegations that consumers saw the testimonials prior to purchasing and opening the Slimquick box, or that consumers relied on them in making the decision to undertake the WellNx diet.¹⁵ While conceding that the alleged misrepresentations of the Slimquick and NV ingredients were visible on the packaging, the Woodgates contend that there are no allegations in the Amended Complaints that plaintiffs relied on the misrepresentations or suffered any harm as a result of taking either product.

Recognizing the jurisdictional pleading deficiencies of the Amended Complaints, plaintiffs ask the court to permit preliminary discovery before deciding the issue, arguing “that jurisdiction . . . is intertwined with . . . liability for acts and omission of the defendant

¹⁴Neither of the Woodgates has ever traveled to Maryland, Massachusetts, or New Jersey. The Nevada Amended Complaint alleges that they attended the annual “Mister Olympia” bodybuilding competition in Las Vegas, but does not allege that their attendance was connected to the marketing of Wellnx’s products. None of the Amended Complaints allege that either of the Woodgates communicated by mail, telephone, or through any other media with any plaintiff in any forum state.

¹⁵While the testimonials may not have influenced the original purchasing decision, it would seem that a consumer might well have relied upon them in continuing to purchase Slimquick or in recommending Slimquick to others.

companies which [the Woodgates] alone own.” The law in this respect is very friendly to plaintiffs. See Blair v. City of Worcester, 522 F.3d 105, 111 (2008) (“[W]here a plaintiff can demonstrate the existence of a plausible factual disagreement or ambiguity, our jurisprudence favors permitting the litigants the opportunity to flesh out the record.”); Lamb v. U.S. Dep’t of Interior, 342 F.3d 1080, 1093 (9th Cir. 2003) (“[D]iscovery should ordinarily be granted where the pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary.”); United States v. Swiss Am. Bank, Ltd., 274 F.3d 610, 625-626 (1st Cir. 2001) (leave to conduct limited jurisdictional discovery should be freely granted under a generously low showing by the plaintiff of the need for such discovery); Massachusetts Sch. of Law at Andover, Inc. v. Am. Bar Ass’n, 107 F.3d 1026, 1042 (3d Cir. 1997) (“Our rule is generally that jurisdictional discovery should be allowed unless the plaintiff’s claim is clearly frivolous.”).

Consistent with these cases, the court will allow plaintiffs a four-month period of jurisdictional discovery on the issues of: (1) the extent of the Woodgates’ knowledge of the falsity of the Slimquick testimonials; (2) the approvals or directions given by the Woodgates to distributors to include false materials in the packaging or promotion of WellNx products; and (3) the extent of the Woodgates’s knowledge and condonation of the misrepresentation of the products’ ingredients.

Personal Jurisdiction over Global Health

Plaintiffs assert personal jurisdiction over Global Health on the same allegations of tortious conduct. Conceding that there are no specific allegations linking Global Health to the forum states, plaintiffs allege that “the Woodgates, who are the sole shareholders

of both WellNx and Global Health are using the corporate form as a sham.” Accordingly, plaintiffs allege “that every act and omission committed by WellNx was also committed by Global Health.”

Global Health was incorporated on March 21, 2006. Global Health has no employees, and has never been involved in the distribution, sale, or marketing of WellNx products. Global Health’s books and records are maintained in Mississauga, Ontario. Global Health has never been licensed to do business in any forum state. Global Health does not own property or pay taxes in any forum state. Moreover, there are no allegations in the Amended Complaints that Global Health has engaged in a purposeful contact with any resident of a forum state. There are no alleged contracts between Global Health and any retailers in the forum states; there are no sales figures or distribution numbers alleged for the forum states; and Global Health has no offices, representatives, realty, personality, bank accounts, or any other presence in any forum state.

Plaintiffs assert that because defendants do not contest the allegations in the Amended Complaint, “the court must accept them as true.” This assertion, however, ignores the declaration of Brad Woodgate stating that Global Health “is the parent company of WellNx and functions solely as its holding company . . . [and] it has no employees or operations. Global Health has never had any involvement in the distribution, sale or marketing of any WellNx products . . . [and] has never been licensed to conduct business in the States of Maryland, Massachusetts, Nevada or New Jersey.” Brad Woodgate Decl. ¶¶ 11-13. In sum, plaintiffs have failed to demonstrate that their fraud claims “arise out of or relate to” Global Health’s contacts with the forum states, or that

discovery might turn up relevant jurisdiction evidence. Consequently, Global Health will be dismissed for lack of *in personam* jurisdiction.

ORDER

Global Health's motion to dismiss for want of personal jurisdiction is ALLOWED. The Woodgates's motion to dismiss on the same ground is DENIED without prejudice pending the conclusion of the four-month jurisdictional discovery period.

SO ORDERED.

/s/ Richard G. Stearns

UNITED STATES DISTRICT JUDGE